

Can The Boat People Assert A Right To Remain In Asylum?

World political reaction to the Southeast Asian refugee crisis has not asserted the refugees' human rights under international law. As a result most of the refugees lack security from forcible return to the conditions they fled. They would have that security if the world powers act instead to implement non-refoulement, an established moral principle that arguably has attained the status of customary international law.

The summer of 1979 may go down in history as the Summer of the Boat People¹ because of the hundreds of thousands of Indochinese refugees² who fled Vietnam, Laos, and Kampuchea

1. "Boat People" herein, in accordance with the current popular usage, means refugees leaving Indochina by sea. The seaborne Haitian and Cuban refugees arriving in the United States also could be termed boat people, but their legal problems are somewhat different. See text accompanying notes 139-45 *infra*. The Indochinese exodus has continued for years on a relatively small scale: as of 1975 about 5,400 persons had left the area by small boat, and another 2,000 took this route in 1976. Comment, *The Dilemma of the Sea Refugee: Rescue Without Refuge*, 18 HARV. INT'L L.J. 577 n.1 (1977). By contrast, a refugee assistance organization estimated in July 1979 that the departure rate for May and June had been 118,000 persons per month, 50% of whom were lost at sea. Press release by Refugees International, Tokyo (July 1979).

The thousands of refugees who fled overland from Kampuchea into Thailand in the fall of 1979 have approximately the same legal status as those who arrived by boat. For an overview of the causes and effects of that migration, see *Deathwatch: Cambodia*, TIME, Nov. 12, 1979, at 42.

2. "Refugees" herein means international political refugees, *i.e.*, persons forced to leave or stay away from their state of nationality because of political events making their continuance there impossible, and who have taken refuge in another state without acquiring a new nationality. See S. SINHA, ASYLUM AND INTERNATIONAL LAW 95-105 (1971). This discussion does not apply to economic refugees except insofar as their economic deprivation is politically motivated. See note 144 *infra* (poverty in Haiti as persecution).

The situation of the Indochinese refugees is complicated by economic scarcity. As a result of years of warfare, all three of the Indochinese states have little food to go around. In some parts of Kampuchea the scarcity amounts to famine, and it is reasonable to say that the majority of the ethnic Kampuchean refugees left because of this economic deprivation. See *Deathwatch: Cambodia*, *supra* note 1. The need for asylum, however, is predicated on the repressive measures awaiting the refugees on their return, not on the factors that motivated their leaving. In regard to the Kampuchean refugees, there is evidence that they face persecution on their return simply because they left, even though they left for nonpolitical reasons. See note 19 *infra*.

The motivation of the ethnic Chinese Boat People can be characterized in a sense as economic. Chinese in Vietnam largely follow mercantile occupations, and a merchant

in leaky, overcrowded boats, desperately seeking temporary asylum³ from politically and ethnically motivated persecution⁴ in their native lands. For most, the long sea voyage was a terrifying ordeal, and many thousands did not survive it.⁵ Even for those

class has no place in a socialist society. Interview with Ann Fagan Ginger, visiting professor, University of Puget Sound Law School, in Tacoma (Oct. 28, 1980). There is evidence, however, that the repression they fled, although in part economically implemented, has also been directed against them as a people and implemented through social persecution. See note 19 *infra*.

No disinterested tribunal has determined the exact nature of the repressive measures that impelled the Boat People to risk their lives at sea or the certainty that those measures still await them. The notorious events of the past 2½ years, however, raise a reasonable question regarding their safety if they return home.

3. "Asylum" may mean a place or territory where one is not subject to seizure by one's pursuers, or it may mean protection or freedom from such seizure. The latter sense is the usual meaning in international law. II A. GRAHL-MADSEN, *THE STATUS OF REFUGEES IN INTERNATIONAL LAW* § 161 (1972). When a state has difficulty granting asylum, as in the case of a mass influx, it may admit persons only temporarily and then, when a chance arises for resettlement elsewhere, advise them to leave its territory or expel them if necessary. *Id.* § 223. The United Nations codified such provisional or temporary asylum in the GAOR Declaration on Territorial Asylum of 14 December 1967, art. 3, § 3, G.A. Res. 2312, 22 U.N. GAOR, Supp. (No. 16) 81, U.N. Doc. A/5217 (1967).

4. "Persecution" is an imprecise term of art in United Nations treatment of refugees. The distinction between persecution and mere discrimination is an evidentiary one and difficult to draw without bias. See text accompanying notes 142-48 *infra*. The more liberal school of commentators holds that any measure "in disregard of human dignity" may be persecution. Weis, *The Concept of the Refugee in International Law*, U.N. Doc. HCR/INF/49, at 22 (1961). See also J. VERNANT, *THE REFUGEE IN THE POST-WAR WORLD* 8 (1953). The more restrictive school limits the term to deprivation of life or physical freedom, including protracted forced unemployment. K. ZINK, *DAS ASYLRECHT IN DER BUNDESREPUBLIK DEUTSCHLAND NACH DEM ABKOMMEN VOM 28. JULI 1951 ÜBER DIE RECHTSSTELLUNG DER FLÜCHTLINGE UNTER BESONDERER BERÜCKSICHTIGUNG DER RECHTSSPRECHUNG DER VERWALTUNGSGERICHTE* 74 (1962), *paraphrased in* I A. GRAHL-MADSEN, *supra* note 3, § 82. For United States judicial interpretations consistent with the restrictive school, see *Dunat v. Hurney*, 297 F.2d 744, 746 (3d Cir. 1961) ("The denial of an opportunity to earn a livelihood . . . is the equivalent of a sentence to death by means of slow starvation . . .") and *Blazina v. Bouchard*, 286 F.2d 507, 509 & n.2 (3d Cir. 1961) (public scorn and denial of government employment insufficient to constitute "physical persecution" on religious grounds). See note 19 *infra*. See generally I A. GRAHL-MADSEN, *supra* note 3, §§ 80-87.

5. Many boats, unfit for a sea voyage, foundered in the international waters of the South China Sea. Refugee aid workers estimate that at the height of the exodus, up to 70% of the boats did not finish the trip. Lewis, *A Crime Against Humanity*, N.Y. Times, June 14, 1979, § A, at 29, col. 1; *U.S. to Double Its Refugee Quota to 14,000 a Month*, *id.*, June 29, 1979, at 1, col. 3. Many drownings occurred because commercial ships in the zone ignored vessels in distress. *U.S. Is Collecting Refugee Reports on Mistreatment by Malaysia's Navy*, *id.*, July 26, 1979, at 6, col. 3. The settled rule of maritime law is that the master of a ship is duty bound to rescue anyone in danger of being lost at sea. Convention for the Unification of Certain Rules with Respect to Assistance and Salvage at Sea, signed Sept. 23, 1910, 37 Stat. 1658, T.S. No. 576. Traditionally, however, no sovereign state has the duty to take in unwanted aliens arriving by vessel, and thus freighters in the South China Sea could have become permanent caretakers of hundreds of desti-

lucky enough to reach other shores and receive permission to land,⁶ the terror may not be over. Because they are present at the sufferance of the governments that admitted them, the great majority⁷ of the Boat People cannot rely on due process of law to prevent arbitrary repatriation⁸ if those governments change

tute "passengers." The likelihood of prosecution is remote for the master who declines to take on that burden. One writer recommends reimbursement of shipowners and an international convention compelling temporary asylum as solutions to the freighters' dilemma. Comment, *supra* note 1, at 577-78, 601-04.

6. Thailand, Malaysia, Indonesia, Hong Kong, Singapore, and the Philippines have provided shelter in temporary camps for about 500,000 refugees. Alexander, *Refugees International: determined to do something*, Tokyo Weekender, July 5, 1979, at 4, col. 1. In June 1979, however, Malaysia began pushing off boats that had made it to the beach and forcing refugees to reembark if they jumped off into the shallow water. The alternative for the passengers was to return home or travel hundreds of miles farther to Indonesia. (Singapore, directly south of Malaysia, closed its borders early and has refused to accept more Boat People.) Interview with Michael J. Morrissey, Director of Refugees International, in Tokyo (July 12, 1979); N.Y. Times, July 3, 1979, at 3, col. 2.

Savage pirate attacks, sometimes hitting the same boat several times, began in Thailand's coastal waters in late summer of 1979. Refugee workers suspected that the attacks were condoned and perhaps organized by local Thai authorities. Interview with Michael J. Morrissey, *supra*. Pirate attacks have continued against the relatively small number of refugee boats still essaying the trip. *Thai Piracy Against Boat People Seems Relentless*, N.Y. Times, May 7, 1980, § A, at 6, col. 1.

7. The greater part of the Boat People now in temporary asylum, some 300,000, are encamped in Thailand, Malaysia, Indonesia, Singapore, and the Philippines. These five states have asserted the right to return all refugees to their states of origin, including those already in transit camps being processed for permanent asylum in other countries. *5 Asian Nations Bar Any More Refugees*, N.Y. Times, July 1, 1979, at 1, col. 5.

Another 240,000 Boat People of Chinese ethnicity have found shelter in the People's Republic of China. Although they too are housed in temporary camps, they can claim the prerogatives of citizenship because Chinese law and policy since 1909 have followed the doctrine of *jus sanguinis*: anyone of Chinese extraction in the paternal line, though several generations removed from the homeland, has Chinese citizenship unless he repudiates it. 1 J. COHEN & H. CHIU, *PEOPLE'S CHINA AND INTERNATIONAL LAW* § 23 (1974).

8. Expatriation in law is the voluntary act of abandoning one's country and becoming the citizen or subject of another. BLACK'S LAW DICTIONARY 517 (5th ed. 1979). Repatriation is its negation, the "regaining [of] nationality" after expatriation. *Id.* at 1167. Repatriation need not be voluntary, and this comment discusses the situations where it is not. Customarily, physically crossing a border does not force the other country to recognize the newcomer as a subject, although he is *de facto* subject to that country's police power. *See id.* at 1277-78; notes 97-99 *infra*. Likewise, crossing back does not force the original country to restore the newcomer's nationality; he may become what is known as a stateless person, i.e., one without a nationality. Nevertheless he is repatriated in the sense that he is again subject to his country's police power. *See Weis, The International Protection of Refugees*, 48 AM. J. INT'L L. 193, 196 (1954) (forcible repatriation).

Pushing refugee boats back out to sea arguably is not repatriation because the boats need not return to their original port. *See* Comment, *supra* note 1, at 590, 594. On the other hand, when the passengers are at the end of their resources and the next possible asylum state is hundreds of nautical miles away, return may be the only reasonable alternative to death at sea. When the return trip too is hundreds of miles, the practical result

their attitude. This is so because due process,⁹ despite advances in worldwide recognition of human rights,¹⁰ is still a concomitant of citizenship or of recognized alien status.¹¹ A lag in the development of international law and custom allows some accepting states to deny refugees alien status even while granting them temporary asylum; in those countries, which include the United States of America, the Boat People can be present in body but not "present" at municipal law.¹² Their permission to remain

is that there is no alternative.

9. The term "due process" is seldom used in international law, perhaps because its meaning varies considerably from one state to another. In the narrow sense, due process requires only that government action against the individual proceed in a legally sanctioned manner. In the broader sense, as used herein, due process requires that the individual have notice and a fair hearing before being deprived of legal rights or privileges. See BLACK'S LAW DICTIONARY 449 (5th ed. 1979). "Fair" is a relative term and can connote more procedural safeguards in a country like the United States, where due process has been extensively litigated, than in other countries. For discussion and cases on the development of procedural due process in the United States, see G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 459-501 (10th ed. 1980).

Irrespective of what may constitute a *fair* hearing, this comment takes the position that mass repatriation with *no* hearing is lack of due process as the term is used in the principal international instrument on refugee rights:

[E]xpulsion . . . shall be only in pursuance of a decision reached in accordance with due process of law. . . . [T]he refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.

Protocol Relating to the Status of Refugees, *done* Jan. 31, 1967, art. 32, § 219, U.S.T. 6223, 6276, T.I.A.S. No. 6577, 606 U.N.T.S. 267.

10. Oppenheim defines human rights as "the right of existence, the right to protection of honour, life, health, liberty, and property, the right of practising the religion of . . . choice, the right of emigration, and the like." I L. OPPENHEIM, INTERNATIONAL LAW § 292 (3d ed. 1920) ("rights of mankind"). The 30 articles of the Universal Declaration of Human Rights of 10 December 1948, G.A. Res. 217A (III), U.N. Doc. A/811 (1948) [hereinafter cited as Universal Declaration], reprinted in BASIC DOCUMENTS ON HUMAN RIGHTS 106 (I. Brownlie ed. 1971), embody the current international understanding of fundamental human rights. See also L. SOHN & T. BUERGENTHAL, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 1-8 (1973).

11. An alien is a natural or legal person who, in respect to a particular political society, is not a member. See H. STEINER & D. VAGTS, TRANSNATIONAL LEGAL PROBLEMS 2-17 (1968). Aliens often receive different treatment according to their mode of entry into the particular society. Permanent resident aliens, those who have declared their intention to immigrate, usually have the broadest protection under the laws. In constitutional states they enjoy most of the rights granted under the constitution. Nonimmigrant aliens, temporarily in the country to visit or attend school, are next in status. Both types of alien have recognized status because their admission is through regular governmental procedures. Unrecognized aliens are those who have made surreptitious entry or have been denied legal entry; they have the least protection. See Comment, *Extending the Constitution to Refugee-Parolees*, 15 SAN DIEGO L. REV. 139, 142-49 (1977).

12. Municipal law is that which derives from custom grown up within the boundaries of the state concerned and from statutes enacted by the lawgiving authority. I L.

derives only from administrative or legislative conferral; and permission that is specially conferred can be easily revoked.¹³

In contrast to municipal law, international law¹⁴ recognizes human rights that exist independent of alienage. These rights are embodied in the International Bill of Rights, a series of documents that the United Nations inaugurated in 1948¹⁵ to define and protect fundamental human freedoms. At first broadly worded and put forth as a "common standard of achievement,"¹⁶ this body of law through subsequent citation and expatiation has pervaded world politics with amazing speed.¹⁷ International human rights law forbids any state forcibly to repatriate political refugees to a state of origin where persecution awaits them.¹⁸ Documented severe discrimination, amounting to outright perse-

OPPENHEIM, INTERNATIONAL LAW § 20 (8th ed. H. Lauterpacht 1955).

13. In contrast, constitutional rights accompanying recognized legal status are irrevocable. Legal status therefore confers on the alien a security that a legislature, however humanitarian its motives, cannot be held accountable for. The majority of national governments are, at least in theory, constitutional. WORLD PEACE THROUGH LAW CENTER, LAW AND JUDICIAL SYSTEMS OF NATIONS *passim* (3d rev. ed. 1978).

14. International law derives from custom grown up within the community of nations and from lawmaking treaties concluded by the members of that community. Adherence to international law is by consent, which may be (a) express, by treaty, or (b) tacit, by adopting the custom of submitting to certain rules of international conduct. I L. OPPENHEIM, *supra* note 12, §§ 16, 20.

15. I.L.A. Committee on Human Rights, *Ratification Now*, HUMAN RIGHTS, summer 1978, at 38.

16. Universal Declaration, preamble, *supra* note 10, at 145. Typical of the document's generality is the article on asylum, which states merely that "everyone has the right to seek and to enjoy in other countries asylum from persecution." *Id.* art. 14, § 1. Subsequent instruments such as the Convention Relating to the Status of Refugees, done July 28, 1951, 189 U.N.T.S. 137, reprinted in BASIC DOCUMENTS ON HUMAN RIGHTS, *supra* note 10, at 135, and the Declaration on Territorial Asylum of 14 December 1967, *supra* note 3, flesh out the meaning of asylum. See, e.g., notes 3 *supra* & 18, 70, 71 *infra*.

17. Nearly all other bodies of international law are of ancient lineage. Maritime law and the law of warfare, for instance, go back almost to the beginning of recorded history. I L. OPPENHEIM, *supra* note 12, §§ 39-41. The accelerated development of international human rights law owes much to the disastrous global wars and civil wars of this century. *Id.* § 340k.

18. "No [political refugee] shall be subject to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any state where he may be subjected to persecution." United Nations Declaration on Territorial Asylum of 14 December 1967, *supra* note 3, art. 3, § 1. "No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." Protocol Relating to the Status of Refugees, done Jan. 31, 1967, art. 33, § 1, 19 U.S.T. 6223, 6276, T.I.A.S. No. 6577, 606 U.N.T.S. 267; Convention Relating to the Status of Refugees, done July 28, 1951, art. 33, § 1, 189 U.N.T.S. 137, 176, *supra* note 16.

cution,¹⁹ was the cause of the Boat People's exodus and presumably awaits them if they return. Nevertheless they remain in danger of repatriation because of lags or inconsistencies in the application of international human rights law.

Inconsistencies are the common signs of a clash between old and new concepts in the law.²⁰ Human rights, a new concept in

19. Evidence exists of repression that meets even the restrictive standard for persecution. See note 4 *supra*; *Indochinese Refugees: Hearings Before the Subcomm. on Asian & Pacific Affairs of the House Comm. on Foreign Affairs*, 96th Cong., 1st Sess. 58 (1979) (State Dep't traces the problem to Vietnamese policies in all three countries) [hereinafter cited as *Indochinese Refugees*]. Vietnamese officials acknowledged that their objective was to expel the ethnic Chinese population as quickly as possible. To this end, the government subjected the Chinese to harassment including loss of jobs, closure of schools, curfews, police intimidation, and detention in concentration camps or resettlement zones. *Hanoi Regime Reported Resolved to Oust Nearly All Ethnic Chinese*, N.Y. Times, June 12, 1979, at 1, col. 1. Doong Lap Nhon, an escapee of one of the resettlement zones, known as "new economic zones," described it as a remote forest without houses or food. *Id.*, Aug. 5, 1979, at 3, col. 2.

Non-Chinese in Vietnam have also been subjected to loss of freedom on the basis of profession, politics, and religion. South Vietnamese physicians, lawyers, low-level employees of the previous government, and members of minority religious groups have been confined for up to three years in "collective re-education camps," described by Western experts as similar to penal colonies. Comment, *supra* note 1, at 585; N.Y. Times, *supra*, at 6, col. 4.

Refugees from Kampuchea and Laos suffer from the effects of a number of problems, including open warfare and starvation. U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1979 463-66, 482-87 (Joint Comm. Print 1980). Nevertheless there is clear evidence of political repression directed against the safety and even the lives of civilian noncombatants in those countries. Two warring governments control Kampuchea: the embattled Pol Pot regime in a small part of the west, and a new government controlled by Vietnam in the rest of the country. Refugees have declared their fear of both sides. Pol Pot's soldiers, they have stated, would shoot them as traitors for leaving the country. *Thais Deport 30,000 Cambodians While Others Continue to Arrive*, N.Y. Times, June 12, 1979, § A, at 1, col. 1. Apparently in confirmation of this prediction, gunfire could be heard as Thai troops forced thousands of defenseless Kampuchean refugees back across the border in June of 1979. *At Thai Camp, an Exile's Joy Turns to Grief*, *id.*, June 14, 1979, § A, at 1, col. 3. On the other hand, the majority of the 50,000 refugees forcibly returned by Thailand in June of 1979 were ethnic Chinese. If they escaped being shot by Pol Pot's forces, they faced the same kind of harassment in the Vietnamese zone as the ethnic Chinese were suffering in Vietnam itself. N.Y. Times, June 12, 1979, *supra*.

The bulk of Laotian refugees are members of the Hmong (Meo) tribe, a minority that fought for the French and Americans and continued its resistance to the communist government after the Americans left. To say that the refugee combatants are fleeing persecution is probably not justifiable. U.S. DEP'T OF STATE, *supra*, at 485-86. However, persistent reports of indiscriminate use of poison gas by Laotian and Vietnamese troops against the civilian Hmong population, between 1974 and 1979, lend support to refugees' assertions that this deadly form of persecution awaits them if they return. Colbert, *Poison Gas Use in Indochina*, DEP'T OF STATE BULL., March 1980, at 43.

20. The history of law abounds with instances. An example is the different set of rules governing defamation, depending on whether it is libel (written) or slander (spo-

international law,²¹ has gained its place in conflict with the time-honored tradition of the state's supremacy within its own borders;²² thus it is no surprise that international human rights law is not yet thoroughgoing. One conspicuous discrepancy, mentioned above, is the state's continuing license to tie legal rights to its definition of "presence." In addition, the maxim that "for every right there must be a remedy" does not yet apply here: international law enumerates rights of individuals but no remedies for individuals. Any suit by an individual in an international forum would clash with the ancient but persistent principle that only sovereigns have international standing.²³ Thus,

ken). L. ELDREDGE, *THE LAW OF DEFAMATION* § 12, at 80 (1978) ("Certainly the English judges who created the separate torts of slander and libel never dreamed of what 20th century science would create in new forms and methods for recording and transmitting the thoughts and words of man."). Another example is the preservation of distinct law and equity procedures in courts with full power to do both in the same case. D. DOBBS, *HANDBOOK ON THE LAW OF REMEDIES* § 2.6, at 84 (1973) ("[T]here are courts that view the chancellor and the judge as vastly different creatures, even where they share the same body."). A third example is the elaboration of the unseaworthiness doctrine in United States admiralty law far beyond its original relation to the ship's operation. G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* § 6-38, at 383 (2d ed. 1975) ("The Jones Act count and the unseaworthiness count overlap completely: they derive from the same accident and look toward the same remedy. As a matter of jurisprudential elegance or even of common sense it would have been desirable . . . to abandon the cumbersome fiction that two causes of action are involved.").

On the international level, a prime example is the ability of all states to deal directly with slaves, pirates, and genocidal criminals as individuals in the face of the general rule that only states can be subjects of international law. J. STARKE, *AN INTRODUCTION TO INTERNATIONAL LAW* 66-72 (8th ed. 1977). See also H. Kelsen, *PEACE THROUGH LAW* 76 (1944).

21. "When, a hundred years from now, the International Law Association celebrates its bicentenary, legal historians will surely be saying that one of the chief characteristics of midtwentieth century international law was its sudden interest in and concern with human rights." R. LILICH & F. NEWMAN, *INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW AND POLICY* 1 (1979).

22. Under current international law, a state has discretion where specific conventions are not in force, to determine the reasonable relation between physical and legal presence and to set a reasonable time limit for detention. Some states' practices strain reason. See text accompanying notes 104-18 *infra*.

23. "Such individuals as do not possess any nationality enjoy . . . no protection whatever, and if they are aggrieved by a State they have no means of redress . . ." I L. OPPENHEIM, *INTERNATIONAL LAW* § 291 (8th ed. H. Lauterpacht 1955). "Only States may be parties in cases before the Court." Statute of the International Court of Justice, opened for signature June 26, 1945, art. 34, § 1, 59 Stat. 1031, T.S. No. 993 [hereinafter cited as Statute of the ICJ]. Despite the statute's phrasing, the court [hereinafter the ICJ] in an advisory opinion has declared that the United Nations itself is an international person with capacity to maintain its rights by bringing international claims. Advisory Opinion on Reparation for Injuries Suffered in the Service of the United Nations, [1949] I.C.J. 174. This opinion leaves the door open for possible representation of refugees by an international organization, which has not yet occurred. See text accompany-

absent arguments for modifying the standing requirement, the Boat People must somehow convince their sovereign states to plead their case as if the states themselves were the aggrieved parties. This is unlikely ever to happen because the Boat People's sovereign states caused their troubles in the first place.

This comment assesses legal arguments that might help the Boat People find and assert a right to remain in asylum.²⁴ The focus is on Indochinese refugees because they are one of the greatest masses of displaced persons today.²⁵ Although their emigration has slackened and the recent arrivals of Haitians and Cubans have eclipsed the coverage of them in the United States media,²⁶ hundreds of thousands of Boat People remain in limbo with no reasonable hope of permanent resettlement.²⁷ Furthermore, few Boat People can take advantage of international agreements; the states where the bulk of them sojourn have not ratified any of the international protocols or conventions on refugee rights.²⁸ Thus, the Boat People must rely on international law in its most general form, and any legal argument available to

ing notes 154-59 *infra*.

24. The comment is necessarily limited to one of the many problems the Boat People face. *Cf., e.g.*, Comment, *supra* note 1 (death at sea); N.Y. Times, May 30, 1979, at 14, col. 2 (brutal conditions in camps); TIME, *supra* note 1 (starvation and refusal of initial admission at the frontier).

25. Their numbers are exceeded by the 1.7 million political refugees in the Horn of Africa, where disease and malnutrition are rampant in relief camps. *A Harvest of Despair*, TIME, June 30, 1980, at 34. Of those displaced, however, 1.1 million are not international refugees and are thus unaffected by the entry doctrine: although displaced from their own provinces, they have not crossed an international boundary. See Wren, *Million Ogaden Refugees Clinging to Life in Somalia*, N.Y. Times, May 24, 1980, at 6, col. 3. For a discussion of the boundary crossing requirement in the international recognition of refugees, see Plender, *Admission of Refugees: Draft Convention on Territorial Asylum*, 15 SAN DIEGO L. REV. 45 (1977).

26. *E.g.*, *Refugee Policy Draws Fire in Hearing*, Washington Post, May 13, 1980, § A, at 6, col. 1; *Cuba Will Ignore U.S. Effort to Halt Refugee Boatlift*, *id.*, May 16, 1980, § A, at 1, col. 5; *Destitute Haitian Refugees Threaten to Swamp Bahamas*, *id.*, § A, at 32, col. 1.

27. There is little likelihood that the governments expelling the refugees will change their policies or lose power to more tolerant political systems in the near future. Comment, *supra* note 11, at 149 n.102. The United States, far in the lead of those countries offering secondary asylum (378,000 in five years), allows no more than 5,100 refugees per year, from all sources, to achieve legal alien status. 125 CONG. REC. H12,394 (daily ed. Dec. 20, 1979) (remarks of Rep. Collins).

28. See note 7 *supra*. These five states are all members of the United Nations and as such have implicitly assented to the Universal Declaration of Human Rights as a resolution of the General Assembly. Declarations of the General Assembly, however, are in the nature of recommendations and are not legally binding as international agreements. I A. GRAHL-MADSEN, *supra* note 3, § 25. The legal force of the Universal Declaration has a different source; see text accompanying notes 61-69 *infra*.

them is available to any refugee from persecution.²⁹ To develop those arguments, this comment first examines the evidence that international human rights, through a generation of usage and interpretation, have become customary law³⁰ that applies throughout the world. Second, the comment extrapolates from existing legal doctrine to find grounds for greater consistency in international human rights and correspondingly greater restriction on a state's power to deal with refugees arbitrarily. Finally, it looks at developments in the international law of standing whereby the Boat People may be able to gain representation for enforcement of their rights. If these arguments have any persuasiveness, not only the Boat People but also any other political refugees and future refugees may benefit.

REFUGEEHOOD: ITS PAST AND FUTURE

Arguments for a legal solution to the refugee problem gain added force from the emerging realization that the problem is not a temporary one.³¹ The Boat People cannot safely go home in the foreseeable future, nor are they likely to find any state that will give them citizenship *en masse*. They are permanent refugees, and they are by no means the only group of refugees in that plight.³² The situation of today's refugees thereby differs

29. Refugees for other causes, such as strictly economic suffering, natural disaster, or threat of prosecution for nonpolitical crime, are the concern of somewhat different areas of international law. I A. GRAHL-MADSEN, *supra* note 3, §§ 34-35; see note 2 *supra*.

30. Customary international law is habitual behavior, by organs of states and other subjects of international law, that evidences a general practice accepted as law. The practice must be prevalent at least within a certain region or group of international persons. I A. GRAHL-MADSEN, *supra* note 3, § 26(i). The Statute of the ICJ specifies custom as one of the legal principles to be applied in the court's decision:

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
- (b) *international custom, as evidence of a general practice accepted as law*;
- (c) the general principles of law recognized by civilised nations;
- (d) . . . judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Id., art. 38, § 1, *supra* note 23, at 276 (emphasis added). The order of listing of sources of law in article 38, § 1, is also generally the order of weight given those sources by the ICJ. J. STARKE, *supra* note 20, at 62.

31. See Weis, *supra* note 8, at 220 (evaluation of problem as temporary consistently disproved by historical events).

32. The most notable example is the Palestinians, many of whom have been refu-

from that of the millions made homeless or stateless³³ by the two world wars, most of whom found homes once the fighting stopped. Observers in that era felt that, short of another global war, the number of refugees would dwindle to an easily manageable size.³⁴ Accordingly, voluntary solutions were the predominant mode of dealing with the problem.

The first concerted international effort to deal with refugeehood, by the League of Nations in 1921, was in this voluntary mode. Nearly a million persons had fled the civil war in Russia. The League appointed a High Commissioner for Refugees, whose function was to allocate the refugees among those countries willing to take them in, to find work for them, and to undertake relief work among them with the aid of philanthropic societies.³⁵ The commissioner did not have a mandate to assist all political refugees,³⁶ so as new upheavals produced new expatriates the League extended the mandate by piecemeal resolutions: to the Armenians in 1924,³⁷ to the Assyrians, Assyro-Chaldeans, and Turks in 1928,³⁸ to residents of the Saar in 1935,³⁹ and to Austrians and Sudetenlanders in 1938.⁴⁰ The current refugee assistance agency, the Office of the United Nations High Commissioner for Refugees (UNHCR),⁴¹ has a broad man-

gees since 1948. On the origin of that problem, see Radley, *The Palestinian Refugees: The Right to Return in International Law*, 72 AM. J. INT'L L. 586 (1978).

33. A stateless person may be a refugee, but no necessary correlation between the two statuses exists. International law treats them separately. Thus the Convention Relating to the Status of Stateless Persons, done Sept. 28, 1954, 360 U.N.T.S. 117, reprinted in BASIC DOCUMENTS ON HUMAN RIGHTS, *supra* note 10, at 153, confers on the stateless, i.e., those "not considered as a national by any State under the operation of its law," rights similar to those accorded refugees under the Convention Relating to the Status of Refugees, done July 28, 1951, 189 U.N.T.S. 137, *supra* note 16. I A. GRAHL-MADSEN, *supra* note 3, § 36(iv).

34. However reasonable that may have been at the time, the postwar takeover of many countries by communist governments precluded the foreseeable return of large blocs of refugees and persons who, though absent from their homelands for other reasons, became refugees through the change in government. See I A. GRAHL-MADSEN, *supra* note 3, §§ 36(iv), 148.

35. S. SINHA, *supra* note 2, at 126.

36. Weis, *supra* note 8, at 194.

37. Plan for the Issue of a Certificate of Identity to Armenian Refugees, 5 LEAGUE OF NATIONS O.J. 969 (1924).

38. Arrangement Concerning the Extension to Other Categories of Refugees of Certain Measures Taken in Favor of Russian and Armenian Refugees, done June 30, 1928, 89 L.N.T.S. 63.

39. Refugees from the Saar, art. 2, 16 LEAGUE OF NATIONS O.J. 634 (1935).

40. Draft Protocol, Refugees Coming from the Territory Which Formerly Constituted Austria, 19 LEAGUE OF NATIONS O.J. 647 (1938).

41. The agency was created under the Statute of the Office of the United Nations

date but still essentially depends on voluntary relief measures. The statute of the office describes the commissioner's functions in such phrases as "[p]romoting . . . international conventions," "[a]ssisting governmental and private efforts to promote voluntary repatriation or assimilation," and "[e]ndeavouring to obtain permission for refugees to transfer their assets."⁴² Promoting, assisting, and endeavoring, where the results must depend on charity, are no substitutes for *enforcement* of legal rights.⁴³

Charity, however, when extended on principle can become custom; and custom under some circumstances can become international law.⁴⁴ Paul Weis, legal advisor to the Office of the UNHCR, noted in 1954 that the refugee resettlement agreements of that and other international agencies customarily contained restrictions on expulsion,⁴⁵ and postulated the growth of that custom into a duty. While admitting that states classically had full discretion to exclude aliens, he considered that discretion to be no longer absolute:

It is believed, however, that a rule of international law is in the process of development, which qualifies this right in the sense that states should not refuse admission to a bona fide refugee where such a refusal would expose him to persecution endangering his life or freedom, *i.e.*, primarily at the frontiers of his country of origin. This does not imply that the admitting state should necessarily permit the continued residence of the refugee once admitted. The admitting state may, subject to its treaty obligations, and sometimes does, expel him to another country.⁴⁶

High Commissioner for Refugees [hereinafter Statute of the UNHCR], G.A. Res. 428 (V), 5 U.N. GAOR, Supp. (No. 20) 46, U.N. Doc. A/1775 (1950), and began operation Jan. 1, 1951. Preceding it were three postwar agencies with the same general function: United Nations Relief and Rehabilitation Administration (UNRRA), 1943-1947; Preparatory Commission for the International Refugee Organization (PCIRO), 1947-1948; and International Refugee Organization (IRO), 1948-1950. S. SINHA, *supra* note 2, at 127.

42. Statute of the UNHCR, *supra* note 41, ch. II, para. 8.

43. With the authorization of the General Assembly, it is possible for the UNHCR to secure an advisory opinion on legal rights from the International Court of Justice. Weis, *supra* note 8, at 219 n.68; text accompanying notes 154-59 *infra*. Ensuing enforcement would be through the force of world opinion. See text accompanying notes 162-63 *infra*.

44. See text accompanying notes 53-69 *infra*. See generally I L. OPPENHEIM, *supra* note 12, § 17; S. SINHA, *supra* note 2, at 5-35; J. STARKE, *supra* note 20, at 40-47; see also H. THIRLWAY, INTERNATIONAL CUSTOMARY LAW AND CODIFICATION (1972).

45. Weis, *supra* note 8, at 197-98.

46. *Id.* at 199.

Ten years later Weis stated his rule more emphatically: "There seems to be general acceptance of the principle of the non-return of refugees to a country of persecution."⁴⁷ On hindsight, we need only compare these words with more recent headlines⁴⁸ to conclude that Weis was premature. This does not mean he was wrong. Many commentators agree that the rule is in the "process of development" and disagree only on its pace.⁴⁹ Most would still call it a prediction of the future. A special case of Weis's rule, however, is probably already universal law: the provision in the International Bill of Rights that forbids repatriation (*refoulement*) once asylum is granted.⁵⁰ Those Boat People who are already in temporary asylum (i.e., the great majority⁵¹) should be able to invoke that provision as security against return if not against transfer.⁵²

47. Weis, *Appendix I, Legal Aspects of the Problem of Asylum*, REP. OF 51ST CONF. 283, 292-93 (Int'l L. Ass'n 1965).

48. *E.g., Malaysia to Put 70,000 Refugees Back Out to Sea; Says Vietnamese Trying to Land Will Be Shot*, N.Y. Times, June 16, 1979, at 1, col. 2; 5 *Asian Nations . . . Reserve Right to Enforce Repatriation*, *id.*, July 1, 1979, at 1, col. 5.

49. The drafters phrased the Declaration as a "standard for achievement" rather than a set of immediate obligations. The wording gave rise to conflicting interpretations of publicists as to whether the Declaration was enforceable. Three schools of opinion formed shortly after its publication. One, the naturalist school, held that the Declaration neither imposed obligations on states nor conferred specific rights on individuals. Manley O. Hudson, chief exponent of this school, wrote that the human rights clauses of the United Nations Charter (which the Declaration expands upon) were limited to "setting out a program of action" and did not represent international law at that stage of its development. Hudson, *Integrity of International Instruments*, 42 AM. J. INT'L L. 107 (1948). Another school, the positivists, considered the Declaration immediately and fully enforceable. Hersch Lauterpacht, chief representative of this view, found a "distinct element of legal duty" attaching to the Declaration through article 56 of the United Nations Charter, wherein all members pledged themselves to joint and separate action. H. LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* 147-49 (1950). A third school, the evolutionary, found no immediate obligations but pointed out the existence of "latent possibilities" for growth. J. ROBINSON, *HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS IN THE CHARTER OF THE UNITED NATIONS. A COMMENTARY* 105 (1946), *quoted in* Schwelb, *The International Court of Justice and the Human Rights Clauses of the Charter*, 66 AM. J. INT'L L. 337, 341 (1972). Subsequent practice has tended to bear out the opinions of the latter two schools. *See* text accompanying notes 66-73 *infra*.

50. *See* note 18 *supra*.

51. Most of those not now in temporary asylum are dead. *See* notes 5 & 6 *supra*.

52. Those turned back initially at the border do not achieve expatriation and thus are not covered by the repatriation provision. II A. GRAHL-MADSEN, *supra* note 3, § 178(i). In humanitarian terms and in terms of fundamental human rights, it is absurd to distinguish between refugees who step a few feet across an imaginary line and those who are stopped a few feet short. Their needs are the same. The distinction is a creature of the conflict between human rights law and the state sovereignty principle. A state that lets refugees cross its borders is performing an act of sovereignty that creates hitherto nonexistent obligations. The sovereignty principle, though waning in importance, still

SOURCES OF AUTHORITY IN REFUGEE LAW

No court in the world has yet grounded a decision on Weis's rule;⁵³ similarly, no state that did not sign the international covenant prohibiting repatriation has been held liable for it. This lack of explicit authority is not fatal to the rule, which exists, if at all, as customary international law. Customary law grows in a complex interaction between pronouncement and practice,⁵⁴ and often the articulation of a rule does not occur until after its general adoption. Ultimately, however, the rule must have its source in the black letter of treaties or other international instruments.⁵⁵ Initially the terms of such documents bind only the states that sign them, but if such a term becomes the basis of a worldwide practice, it can bind⁵⁶ states that never explicitly agreed to it.

The black letter of refugee rights begins in the United Nations Charter, wherein the member states pledge themselves to act for universal observance of human rights and fundamental freedoms.⁵⁷ Every state joining the United Nations, upon admis-

has the power to weigh in the balance against newer rules. See notes 20 & 23 *supra*. See also S. SINHA, *supra* note 2, at 108-11.

53. II A. GRAHL-MADSEN, *supra* note 3, § 181. Austria, Belgium, France, the Federal Republic of Germany, Italy, Norway, Sweden, and Switzerland confer a right to be granted asylum under municipal law, but according to Grahl-Madsen these measures are not evidence of international custom because the motivation was humanitarian, not legal. *Id.* § 182.

54. Weis, *supra* note 8, at 221.

55. Practice constitutes the custom, and the black letter constitutes acceptance of the custom. Both elements must normally be present before the custom can become law. See H. THIRLWAY, *supra* note 44, at 46-60. There are occasional exceptions to the black letter requirement, as in a right-of-way dispute between Portugal and India that came before the ICJ. The occurrence of a "constant and uniform practice" of passage over the disputed zone for 125 years satisfied the court that the parties had accepted the practice as law and that it gave rise to a right and a correlative obligation. Right of Passage over Indian Territory (Merits), [1960] I.C.J. 6, 40.

56. Lacking overall political authority, international law never binds absolutely. No state can be compelled to abide by customary law it chooses to ignore. *Cf.* Weis, *supra* note 8, at 195 ("Universality and enforcement are two moot points of international law."). A decision of the ICJ affirming customary law has its chief legal force through its effect on conscience and through the justification it provides for diplomatic sanctions or even self-help against the offending state. Only 43 of the 153 United Nations member states have submitted to ICJ jurisdiction, most of them with major reservations. *Court of Lost Resort*, NEWSWEEK, Dec. 24, 1979, at 83. The ICJ's advisory opinions, however, carry persuasive authority that can focus international policy and action. See note 67 *infra*.

57. "[T]he United Nations shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." U.N. CHARTER art. 55. "All Members pledge themselves to take

sion, adheres to that charter as a multilateral treaty.⁵⁸ The charter itself does not define such rights and freedoms, but the United Nations issued an authoritative guide to their content⁵⁹ in the Universal Declaration of Human Rights⁶⁰ of 1948. Intended as the first in a series of documents called the International Bill of Rights,⁶¹ the Universal Declaration is basic to the others and carries the widest influence. It enumerates rights of well-being,⁶² nondiscrimination,⁶³ equal protection,⁶⁴ and fair hearing,⁶⁵ all of which apply to the Boat People's situation, as rights of all human beings irrespective of their citizenship or res-

joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55." *Id.* art. 56. See W. BISHOP, *INTERNATIONAL LAW CASES AND MATERIALS* 62-68 (2d ed. 1962).

58. "All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter." U.N. CHARTER art. 2, § 2. "Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations." *Id.* art. 4, § 1.

59. I. BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 554 (2d ed. 1973). The vote in the General Assembly to adopt the Universal Declaration was 48 states in favor, none opposing, and eight abstaining. *BASIC DOCUMENTS ON HUMAN RIGHTS*, *supra* note 10, at 106. When the General Assembly adopts such a resolution concerned with general norms of international law, the majority vote is evidence of authoritativeness because it represents the opinions of governments expressed "in the widest forum for the expression of such opinions." I. BROWNLIE, *supra*, at 14.

60. *Supra* note 10. The preamble of the Universal Declaration relates it specifically to the obligations of articles 55 and 56 of the United Nations Charter: "Whereas Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms," *Id.* preamble, para. 6.

61. Besides the Universal Declaration, the Bill comprises three other documents: the International Covenant on Economic, Social, and Cultural Rights, *opened for signature* Dec. 16, 1966, G.A. Res. 2200A, 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316, *reprinted in* *BASIC DOCUMENTS ON HUMAN RIGHTS*, *supra* note 10, at 199; the International Covenant on Civil and Political Rights, *id.*, Supp. (No. 16) 52, at 211; and the Optional Protocol to the International Covenant on Civil and Political Rights, *id.*, Supp. (No. 16) 59, at 232. Kindt, *A Historical Analysis of International Documents Relating to the Status of Women and Their Relationship to the Future Foreign Policy of the United States*, 2 U. PUGET SD. L. REV. 221, 230 (1979).

62. "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services" Universal Declaration, art. 25, § 1, *supra* note 10, at 111.

63. "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind" *Id.* art. 2, at 108.

64. "All are equal before the law and are entitled without any discrimination to equal protection of the law." *Id.* art. 7. See note 95 *infra*.

65. "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal" Universal Declaration, art. 10, *supra* note 10, at 108-09. See note 9 *supra*.

idence. The document states these rights as broad goals rather than binding law. Nevertheless, in the past generation the General Assembly of the United Nations,⁶⁶ the International Court of Justice (ICJ),⁶⁷ and a growing number of member states⁶⁸

66. The General Assembly, paramount executive body of the United Nations, has many times in its resolutions voiced the authority of the Universal Declaration. In the Russian wives case of 1949, the Assembly declared that the U.S.S.R. was not in conformity with article 55 of the charter (and thereby the Universal Declaration) when it prevented wives of that nationality from leaving the country to join their foreign husbands abroad. Schwelb, *supra* note 49, at 341. In 1959, 1961, and 1965, the Assembly called upon the People's Republic of China to cease practices in Tibet that deprived the people of their fundamental human rights, and appealed to all states for their best endeavors to put an end to the practices. *Id.* In 1953, 1960, and 1963, the Assembly condemned the racially discriminatory practices of the Union of South Africa. *Id.* at 342. In its 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples, the Assembly proclaimed the duty of every state to "observe faithfully and strictly" the provisions of the Universal Declaration. L. SOHN & T. BUERGENTHAL, *supra* note 10, at 518. Similar wording appeared in the 1963 Declaration on the Elimination of All Forms of Racial Discrimination. *Id.* Both declarations passed by unanimous vote.

67. The ICJ is the successor to the Permanent Court of International Justice (PCIJ), the first true international court, which the League of Nations created in 1920. No state is legally compelled to submit its international disputes to a tribunal, and thus the ICJ has jurisdiction only when both parties agree to it. In addition, however, the court issues advisory opinions that help develop international law. In its Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia, [1971] I.C.J. 16, the court affirmed the General Assembly's revocation of South Africa's 1919 mandate over Namibia (South West Africa) because of continuing racial discrimination against the natives:

[V]iewing the institutions of 1919, the Court must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law. Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation.

Id. at 31. The court ruled that "[u]nder the Charter . . . [South Africa] had pledged itself to observe and respect, in a territory having an international status, human rights and fundamental freedoms for all without distinction as to race." South Africa's establishment of *apartheid* segregation in Namibia was therefore "a flagrant violation of the purposes and principles of the Charter." *Id.* at 57.

68. The Universal Declaration is affirmed in the constitutions of, e.g., Chad, Congo, Ivory Coast, Dahomey, Gabon, Mali, Mauritania, Niger, Senegal, Burundi, Rwanda, Libya, Cyprus, Jamaica, Trinidad and Tobago, Nigeria, Sierra Leone, Madagascar, and Kenya. E. SCHWELB, HUMAN RIGHTS AND THE INTERNATIONAL COMMUNITY 50-54 (1964). Even without such incorporation, states invoke it as law in their external dealings. The United States, which has not ratified the Universal Declaration and recognizes no internal obligations toward individuals arising under it, nevertheless cited the Declaration in its written statement to the ICJ supporting the *Namibia* decision, note 67 *supra*. Comment, *Individual Enforcement of Obligations Arising Under the United Nations Charter*, 19 SANTA CLARA L. REV. 195, 207 (1979).

Internally, United States municipal courts seldom consider article 55 of the United Nations Charter or the Universal Declaration as rules of decision although the United

have invoked the Universal Declaration as if it had some real force. The result is that it *does* have real force.⁶⁹ Furthermore,

States as a United Nations member has ratified the charter. The United States follows the doctrine of self-execution of treaties, which means that a duly signed international agreement that confers enforceable rights on individuals becomes the law of the land. See Comment, *supra*; J. STARKE, *supra* note 20, at 89-102 (internal self-execution of treaties). Several attempts to plead the Declaration in United States trials have failed, however, because courts held that it conferred no individual rights. *People of Saipan v. U.S. Dep't of Interior*, 502 F.2d 90 (9th Cir. 1974); *Sei Fujii v. State*, 38 Cal. 2d 718, 242 P.2d 617 (1952). *Contra*, *Kenji Namba v. McCourt*, 185 Or. 579, 204 P.2d 569 (1949) (U.S. bound by charter). Several United States opinions, while not based on the charter, have cited its article 1 ("respect for human rights") as a compelling statement of public policy. Comment, *supra*, at 199-202. The Second Circuit recently, in *Filartiga v. Pena-Irala*, 49 U.S.L.W. 2039 (2d Cir. June 30, 1980), found a cause of action for an individual under international human rights law by way of the Alien Tort Statute, 28 U.S.C. § 1350 (1970). The statute gives district courts jurisdiction over civil actions by aliens for torts committed "in violation of the law of nations or a treaty of the United States." It thus confers an enforceable right on individuals even where a treaty fails to do so. In interpreting "law of nations" to include customary international law, the court found that the plaintiff had a cause of action for the tort of torture because current international usage and practice confer fundamental rights—including the right to be free from torture—upon all people. See note 150 *infra*.

Thus the United States gives at least partial acceptance to international human rights as principles of internal as well as external law.

69. "The doubts which might have been raised in 1948 . . . have been dispelled by the constant and consistent practice of the United Nations . . ." Sohn, *The Universal Declaration of Human Rights*, J. INT'L COMM. JURISTS, Dec. 1967, at 17, 25. See also notes 14, 30, 49, & 55 *supra*. This legal force derives from attitudes about the Universal Declaration as expressed in words rather than acts. One writer argues that examining what the states of the world actually do, not what they say, belies any custom of respect for human rights:

The worldwide intimidation and torture of citizens by their governments is an undeniable reality. Indeed, it is sufficiently widespread that the "lawbreakers" are quite possibly in the majority . . .

To the layman this Hobbesian state of affairs would lead ineluctably to the conclusion that either human rights are not subject to the jurisdiction of international law, or else that the strictures of that system are so ineffective as to be completely worthless . . .

. . . While it may easily be deduced from the United Nations Charter, the Declaration of Human Rights, the Covenants, various carefully chosen resolutions, and the works of academic commentators that a consistent pattern of human rights violations contravenes general international law, . . . [o]ne's theories must take into account the many situations in which violations of human rights are tolerated or ignored by the world community.

Watson, *Legal Theory, Efficacy and Validity in the Development of Human Rights Norms in International Law*, 1979 U. ILL. L.F. 609, 612, 628. Cf. J. STARKE, *supra* note 20, at 43-45 (existence of international law must meet double test of *opinio juris* and pattern of repeated acts). Watson's argument, however, is directed primarily against the proposition that human rights norms have an appreciable effect on municipal law. Watson, *supra*, at 618. This comment is concerned instead with the international forum, where states espouse and even act upon standards they may nevertheless consider irrele-

two subsequent documents, the Protocol Relating to the Status of Refugees of 1951 and 1967⁷⁰ and the Declaration on Territorial Asylum⁷¹ of 1967, carry on the impetus of the Universal Declaration and apply it specifically to refugees.⁷² Thus, the Boat People can call on a body of legal principles with a history of enforceability.⁷³

The extent of that enforceability is a matter of debate among legal analysts. The Universal Declaration itself is customary international law, but it falls short of granting refugees any right resembling Weis's rule. Rather than a right to claim asylum, however dire the circumstances, the Universal Declaration concedes to refugees only the right to "enjoy" asylum when a state voluntarily confers it.⁷⁴ The omission is deliberate. In the discussion among the national representatives drafting the Declaration, no consensus formed to override the traditional doctrine of a state's absolute control of its borders. The proponents of refugee rights settled for the noncommittal "enjoy" phrasing, neither confirming nor denying individual rights but leaving

vant internally. See note 68 *supra*.

70. The Protocol, *done* Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267, is a restatement of the Convention Relating to the Status of Refugees, *done* July 28, 1951, 189 U.N.T.S. 137, *supra* note 16. The only significant difference is that it omits the "dateline" in the Convention that restricts its scope to persons who were refugees prior to Jan. 1, 1951. The Protocol and Convention spell out the rights of a refugee once he has made entry and is legally present in the asylum country. He is entitled to the same treatment accorded aliens generally; he has free access to the local courts; he can move around freely and choose his place of residence; and his expulsion must follow due process of law.

71. See note 3 *supra*. The declaration makes it a duty of every state not to reject at the frontier refugees coming directly from a territory where their freedom or lives are threatened. Declaration on Territorial Asylum, *supra* note 3, art. 3, § 1. There are only two exceptions: overriding reasons of national security or the need to safeguard the population as in the case of a mass influx. *Id.* art. 3, § 2.

72. Later instruments that pick up and enlarge upon the language of an earlier one are evidence of a customary practice. J. STARKE, *supra* note 20, at 53. In this respect an instrument lacking the status of customary law may serve as a guide in interpreting the content of the custom. Supporting this view is an ICJ opinion citing with approval the concept that "a treaty is to be interpreted 'in the light of its object and purpose' and that for purposes of interpretation of a treaty, the context comprises 'any subsequent practice.'" Barcelona Traction, Light & Power Co., Ltd., [1970] I.C.J. 1, 302-04.

73. The Refugees and Asylum documents are adjuncts to the International Bill of Rights. If the entire Bill had legal force on all states, political refugees would have little need of the adjunct documents to assert a right to asylum. Covenants in international law, however, have legal force only on signatories. J. STARKE, *supra* note 20, at 51. For the special legal significance of the Universal Declaration, see text accompanying notes 59-73 *supra*. For a more conservative contemporary view on the force of the Declaration, see J. STARKE, *supra* note 20, at 393-94.

74. Universal Declaration, art. 14, § 1, *supra* note 10, at 109.

room for future resolution of the issue.⁷⁵ Later, the issue was resolved, in favor of individual rights, in the provisions of the Convention Relating to the Status of Refugees⁷⁶ and the Declaration on Territorial Asylum.⁷⁷ It is important, however, to distinguish these subsequent documents from the Universal Declaration. Conventions, in United Nations terminology, bind only the states that sign them.⁷⁸ The states of Southeast Asia where the masses of Boat People are interned⁷⁹ have not signed either the Refugee Convention or the Protocol that restates it. United Nations declarations, on the other hand, although intended for the world,⁸⁰ lack legal weight in themselves;⁸¹ the Universal Declaration is an exception by reason of its content⁸² and its widespread application.⁸³ The debate among legal analysts is whether the subsequent documents have the weight to fill in the deliberate omission of asylum rights in the Universal Declaration.

To a limited extent, the documents do have such weight. The arguments in their favor are of three basic types. First is the argument that the International Bill of Rights is a unitary package; thus, if the parent document, the Universal Declaration, has the force of law, so do all its progeny.⁸⁴ Second is the

75. II A. GRAHL-MADSEN, *supra* note 3, § 179(ii).

76. See note 18 *supra*.

77. *Id.*

78. J. STARKE, *supra* note 20, at 51.

79. Characteristics of the internment camps are poor shelter, shortages of food and medicine, and forced idleness and restriction. As an example, a walled-in camp the size of a football field in downtown Bangkok housed 1,400 Boat People in barracks designed for 700 persons. Press release by Refugees International, *supra* note 1.

80. Since the acceptance of Zimbabwe in August 1980, 153 of the 158 independent states in the world are United Nations members.

81. The General Assembly lacks the power to enact legislation that binds member states in such areas as human rights. I A. GRAHL-MADSEN, *supra* note 3, § 25. Declarations are formal and solemn instruments used on rare occasions to enunciate great and lasting principles that the international community is strongly expected to abide by. L. SOHN & T. BUERGENTHAL, *supra* note 10, at 519-20.

82. The document was drafted as a manifesto, a pioneering formulation of human rights and fundamental freedoms, and the first stage in a program to achieve universally binding obligations of states. J. STARKE, *supra* note 20, at 393-94. See notes 10 & 49 *supra*.

The principles in the Declaration have their own weight as general norms; some writers consider them *jus cogens*, or peremptory norms, *i.e.*, so important that any treaty provision purporting to violate one of these norms would be void. See J. SZTUCKI, *JUS COGENS AND THE VIENNA CONVENTION ON THE LAW OF TREATIES: A CRITICAL APPRAISAL* (1974); *cf.* J. STARKE, *supra* note 20, at 50-51 (normative treaties). See also note 86 *infra*.

83. See notes 66-68 *supra*.

84. This argument assumes that the three subsequent documents in the Bill, see note 61 *supra*, are restatements or footnotes to the Universal Declaration, adding nothing

argument that the widespread conforming practice of states proves worldwide acceptance of the documents as customary international law.⁸⁵ Third is the argument that the documents themselves are not sources so much as evidence of pre-existing peremptory norms⁸⁶ without which the United Nations would have been unable to draft them. All these arguments have their strengths and weaknesses. The drafting history of the International Bill of Rights indeed suggests a unitary intention; yet the drafters realized from the first that, because of the deep philosophical differences among states, implementation would have to come at different rates for different principles.⁸⁷ As for con-

ing essentially new to it. See, e.g., Newman, *Foreword to A. GINGER, HUMAN RIGHTS DOCKET U.S. 1979* at vii. To the extent that the later documents merely clarify or implement the Universal Declaration, this approach is valid. See note 72 *supra*. See also Nanda, *From Gandhi to Gandhi—International Legal Responses to the Destruction of Human Rights and Fundamental Freedoms in India*, 6 DEN. J. INT'L L. 19, 36 (1976) (Covenant on Civil and Political Rights is authoritative codification of Universal Declaration).

85. On the validity of words versus deeds as constituting practice, see generally Watson, *supra* note 69.

86. "[A] peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 53, U.N. Doc. A/Conf. 39/27, *reprinted in* BASIC DOCUMENTS IN INTERNATIONAL LAW 252 (2d ed. I. Brownlie 1972). "If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates." *Id.* art. 64, at 256. Suggested sources of such peremptory norms include general principles of law recognized by civilized nations, custom, and treaties. J. SZRUCKI, *supra* note 82, § 2.4.4.

87. Thus, in regard to asylum rights, it is bootstrapping to read into the Universal Declaration anything but a deferential approach to state sovereignty. See text accompanying notes 74-75 *supra*. The International Covenant on Civil and Political Rights goes beyond the Declaration in committing each signatory to "ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the . . . Covenant," one of which rights is an effective remedy to anyone whose rights and freedoms are violated. *Id.*, art. 2, §§ 1 & 3(a), *supra* note 61, at 212. The effect is to overturn the entry doctrine, see text accompanying notes 97-102 *infra*, and make municipal law accountable to anyone physically within the state's frontier. While this result is admirable, it is a step beyond the Declaration and does not comport with current state practice under the Declaration. It is undoubtedly because of this and similar erosions of state sovereignty that the General Assembly cast the most recent documents in the International Bill of Rights as covenants and a protocol, enforceable only on states that sign them.

The Universal Declaration has wider effect because it does not bite nearly as deeply. It lays no definite internal obligation on states unless they so interpret their municipal law as to accept it. Many states, even those that have ratified the Universal Declaration, hold it to be non-self-executing at municipal law. See note 68 *supra*. The scope of the Declaration is in the uncharted area outside municipal law, where the Boat People are isolated by their lack of legal entry. Neither the Declaration nor the refugee conventions require municipal law to acknowledge the Boat People: if a state may not arbitrarily

forming practice, the strongest evidence is the incorporation of the nonrepatriation rule in the constitutions of thirty-six states.⁸⁸ On the other hand, those thirty-six are a minority among the 158 independent states that now exist in the world.⁸⁹ The third argument interprets the United Nations documents, the constitutional provisions, related treaties, and behavior of states as cumulative manifestations of the same underlying norm. If this norm exists,⁹⁰ however, it is hard to understand why it did not form the basis of world response to the refugee crisis of 1979. Rather than assert the Boat People's right to asylum, the community of nations pressured Vietnam into a further

return them to persecution, it still may ship them anywhere else without a hearing. To require more of states at this time without their consent is probably pushing customary law further than it yet goes.

88. S. SINHA, *supra* note 2, at 86 n.102; Weis, *supra* note 47, at 288 n.27. A greater number of states—somewhat less than half the membership of the United Nations—have bound themselves to the rule externally by signing the 1951 convention or the 1967 protocol on refugees. Report of the UNHCR, 32 GAOR, Supp. (No. 12) 7, U.N. Doc. A/32/12 (1977); see note 18 *supra*.

89. INFORMATION PLEASE ALMANAC 126 (34th ed. 1980).

90. There is much debate and little consensus on which norms of international law are so fundamental as to be peremptory. J. SZTUCKI, *supra* note 82, § 2.4.5. Common norms include *pacta sunt servanda*, J. STARKE, *supra* note 20, at 63-64, and the prohibitions against piracy and use of force between nations, J. SZTUCKI, *supra* note 82, § 3.5, at 120. Not even the nearly universal condemnations of slavery and of genocide were recognized by more than a bare majority at the United Nations Conference on the Law of Treaties, Vienna, 1968-1969, which drafted the Vienna Convention, as being peremptory. *Id.* at 121. The peremptory status of human rights norms is still more doubtful. See *id.* § 2.4.5, at 85-86 (proposal of human rights as peremptory norms (*jus cogens*) unlikely had not United Nations Charter already provided for them).

Any discussion of international norms runs the danger of assuming that rules arising in the West, where they have a long history, represent a world consensus. One writer states that "in both East and West, writers on international law are virtually unanimous in their acceptance of the idea of an international *jus cogens*." E. SUY, *THE CONCEPT OF Jus Cogens in PUBLIC INTERNATIONAL LAW* 48 (1967). Writers, however, are not states. Although 79 of 110 national delegations (*i.e.*, writers) at the Vienna Conference approved the Vienna Convention, the Convention has yet to receive the ratification of 35 governments that is required to put it into force. J. SZTUCKI, *supra* note 82, § 1, at 3. It is also significant that the Marxist states, active supporters of the concept of peremptory norms, consistently fail to include international protection of human rights in that category. *Id.* § 2.4.5, at 86.

The concept of peremptory norms derives from theories of natural law, an ideal law founded on the nature of man as a reasonable being. Unfortunately the content of such law varies widely according to the interpreter's own philosophical orientation; and its general inefficacy as a modern doctrine shows in the inability of the Vienna conferees to draw up an authoritative list of peremptory norms. For discussion of natural law in relation to international law, see J. STARKE, *supra* note 20, at 23-25; J. SZTUCKI, *supra* note 82, § 2.4.2; Watson, *supra* note 69, at 613-17. On natural law generally, see Carbonneau, *The Implicit Teaching of Utopian Speculations: Rousseau's Contribution to the Natural Law Tradition*, 3 U. PUGET SD. L. REV. 123, 123-38 (1979).

denial of their rights by sealing off her own borders and stopping the emigration.⁹¹ Clearly the Boat People's general right to claim asylum is on shaky ground if it rests on these three broad lines of argument.

A narrower source of authority, the abovementioned special case of Weis's rule,⁹² offers less-than-general relief but rests on a firmer foundation. The principle of *non-refoulement*, or nonreconduction,⁹³ possesses the cachet of age and usage, and, moreover, speaks to the security of those Boat People who already have some kind of asylum. For nearly fifty years this principle has limited forcible repatriation, and its inclusion in the Refugee Protocol⁹⁴ establishes its place in international human rights law.⁹⁵ *Non-refoulement*, however, has one large hurdle: it assumes acknowledgment of the refugees' legal presence by the state whose territory they have physically entered.⁹⁶ Therefore, before discussing *non-refoulement* it is necessary to understand states' current usage of the "presence" definition and why it is ripe for reform.

LEGAL PRESENCE AND THE ENTRY DOCTRINE

Sanctuary is one of the oldest concepts of international law.⁹⁷ Because sovereignty derives from control of territory, a

91. *Hanoi Said to Agree to Attempt to Halt Exodus of Refugees*, N.Y. Times, July 22, 1979, § 1, at 1, col. 6. That measure was itself a violation of another article of the Universal Declaration: "Everyone has the right to leave any country, including his own" Universal Declaration, art. 13, § 2, *supra* note 10, at 109.

92. See text accompanying note 50 *supra*.

93. See II A. GRAHL-MADSEN, *supra* note 3, § 178.

94. See note 18 *supra*.

95. See note 72 *supra*.

96. Another hurdle is lack of unanimity as to whether *non-refoulement* is a legal principle or merely a moral one. Either way, it has enough consensual foundation to be a basis of political action. See note 137 *infra*.

97. Socinus raises the question whether it is permissible to take an enemy prisoner, if he is found in the territory of a third party, *i.e.*, outside the boundaries of the belligerents. He presents arguments on either side, and concludes at length that this is not permissible, citing Angelus, and the rulings in Code, I. xii. 5 and 6. There is support, also, in the statement of Bartolus that a person arrested in another's territory, even by the officers of a local judge, is not legally arrested and his release may be demanded

II P. BELLII, *DE RE MILITARI ET BELLO TRACTATUS* 98-99 (1563) (Classics of Int'l L. ed., No. 18, 1936) (footnotes omitted). "Since no nation can claim any right for itself in the territory of another, it is not allowable to enter with an armed force into the territory of another and take therefrom a fugitive criminal or one hiding there." II C. WOLFF, *JUS GENTIUM METHODO SCIENTIFICA PERTRACTATUM* § 294 (1764) (Classics of Int'l L. ed., No. 13, 1934). See also Nayar, *The Right of Asylum in International Law: Its Status and*

fugitive who sets foot across a frontier is secure from the threat of bodily persecution by his official pursuers.⁹⁸ At the same time he becomes automatically liable to the state on whose land he stands for any wrongs he may commit therein. The rule of sanctuary lacks consistency, however, in at least one sense: it says nothing about the refugee's reciprocal *rights* in the asylum country. International human rights doctrine, proceeding along a separate line of development, has thus far failed to resolve that inconsistency;⁹⁹ it contains no rule of reciprocity for individual rights and duties. If there were such a rule, it might resolve two legal anomalies that place the Boat People in a position of unequal protection.¹⁰⁰

The first anomaly arises from the classical right of any state selectively to grant or withhold entry¹⁰¹ to any who apply at its frontiers. The term "entry" is used with a plasticity that reflects the practical difficulty of patrolling a frontier. No state can police every inch of its borders. In recognition of this fact, inter-

Prospects, 17 ST. LOUIS L.J. 17 (1972).

Sanctuary traditionally has been accorded at the will of the granting sovereign. II A. GRAHL-MADSEN, *supra* note 3, § 199.

98. II A. GRAHL-MADSEN, *supra* note 3, § 199. "The fact that every State exercises territorial supremacy over all persons on its territory, whether they are its subjects or aliens, excludes the exercise of the power of foreign States over its nationals in the territory of another State." I L. OPPENHEIM, *supra* note 12, § 316.

99. *But see* II A. GRAHL-MADSEN, *supra* note 3, § 199 ("[The accepting] State has become responsible under international law for the treatment to which the individual concerned is thereafter subjected."). Nevertheless many countries, especially those where refugees arrive by sea, sidestep the issue via the legal fiction that such refugees are not present. Comment, *supra* note 2, at 594-95.

A strict rule of reciprocity would require that, just as the refugee is liable at municipal law for his wrongs, his rights must be enforceable within that same legal system, not merely at international law. Grahl-Madsen's statement of state responsibility, then, even if generally accepted, is inadequate. The state has the power to initiate process at municipal law, and the refugee has correlative liability to that process. The reciprocal, however, is untrue: the state and all its citizens have immunity against municipal action by the refugee, who has a correlative disability to initiate process. In view of the lack of remedies left to the refugee at international law, *see* text accompanying notes 20-23 *supra*, this is a serious disability. For a formative discussion of jural correlatives and reciprocal relations, *see* Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913), reprinted in W. HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS* 23 (1923).

100. "Equal protection" herein means equality with the protection accorded aliens whose presence is legally recognized. *See* text accompanying notes 118-25 *infra*. Rights peculiar to citizens, such as voting, are not part of such protection. For a discussion of international standards on protection of aliens, *see* F. GARCIA-AMADOR, L. SOHN, & R. BAXTER, *RECENT CODIFICATION OF THE LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS* 1-20 (1974).

101. *See* note 22 *supra*.

national custom allows each state to set up reasonable control points within its territory and call those its places of entry.¹⁰² A state can hold applicants for asylum at these control points until it makes an administrative determination of their status.

Meanwhile the applicants are in limbo. Without a grant of entry, they lack legal presence; they cannot assert the rights the sovereign normally grants aliens in its territory. The sovereign, however, through its control of the territory can assert its power against them. It can and often does punish them for infractions of its criminal code—or can simply send them back without a hearing to whatever fate awaits them in their country of origin.¹⁰³ The more flexible a state's use of the entry concept, the more glaring is the discrepancy between physical and legal presence. Many of the Boat People are held in camps many miles inside national frontiers yet still are not considered "present."¹⁰⁴

The United States' practice exhibits the greatest discrepancy between physical and legal presence. Despite restrictive immigration laws,¹⁰⁵ the executive branch has exercised compassion to allow more than 378,000 Indochinese refugees¹⁰⁶ into the country since 1975. These refugees have a special status known as parole.¹⁰⁷ They may move around within the borders, live where they want, and accept employment with few restrictions.¹⁰⁸ Nevertheless they lack legal presence and are, thus, sub-

102. An example of such a control point in the United States is an immigration center like Ellis Island. See *Kaplan v. Tod*, 267 U.S. 228, 230 (1925).

103. See Comment, *Refugee-Parolee: The Dilemma of the Indochina Refugee*, 13 SAN DIEGO L. REV. 175, 182-83 (1975).

104. Whether the Southeast Asian nations have made any formal definition of presence is difficult to say; none has been asked of them. Their practice of arbitrary return to the frontier and crowding in camps is not consistent, however, with a grant of legal presence. Cf. Comment, *supra* note 1, at 592 n.100 (noting that information on the practice of many states is inaccessible).

105. The number of immigration visas available to aliens from countries not within the Western Hemisphere is limited to 170,000 per year. Comment, *supra* note 103, at 188.

106. 125 CONG. REC., *supra* note 27 (378,000 as of December 1979); Comment, *supra* note 11, at 139 (160,000 as of 1975).

107. The Attorney General has discretion under the parole power of the Immigration and Nationality Act, § 212(d)(5), 8 U.S.C. § 1182(d)(5) (1976), to admit aliens temporarily in the public interest. Parole is not considered a grant of entry. In practice, the Attorney General delegates the parole power to immigration officials in individual cases; but the President sometimes uses the power to accept groups of refugees *en masse*. President Eisenhower in 1956 first invoked the parole authority for this purpose when he admitted refugees from the turmoil in Hungary. See Comment, *supra* note 103, at 176 n.9, 177, 179.

108. The Attorney General has discretion to grant parole "under such conditions as

ject to expulsion from the country¹⁰⁹ by administrative fiat. The normal constitutional guarantee of judicial review for aliens after a deportation decision by the Immigration and Naturalization Service (INS) is closed to them.¹¹⁰ Authority for this practice is section 212(d)(5) of the Immigration and Nationality Act of 1952,¹¹¹ which the United States Supreme Court interpreted

he may prescribe," 8 U.S.C. § 1182(d)(5) (1976), and could thereby restrict parolees either to camps or to a specific geographic area. Comment, *supra* note 11, at 146, 158. In fact, the Indochinese refugees are spread throughout the country, and Congress has appropriated money to aid them in resettlement. *Id.* at 157 & n.155.

Permanent resident aliens have the constitutional right to earn a livelihood in the United States, *Truax v. Raich*, 239 U.S. 33, 41 (1915), but this right does not extend to other classes of aliens. Nonimmigrant aliens generally may not work without special permission, and illegal aliens have no right whatever to pursue employment. 1 C. GORDON & H. ROSENFELD, *IMMIGRATION LAW AND PROCEDURE* § 1.34a (rev. ed. 1980). Congress, however, granted the Indochinese parolees exemption from the special permission requirement in the 1976 amendments to the Immigration and Nationality Act, Pub. L. No. 94-571, § 212(a)(14), 90 Stat. 2703 (1976) (codified at 8 U.S.C.A. § 1182(a)(14) (West Supp. 1980)).

109. The expulsion process for an alien without legal presence is termed exclusion. The deportation process has constitutional safeguards to ensure that "no person shall be deprived of his liberty without opportunity, at some time, to be heard . . ." The Japanese Immigrant Case, 189 U.S. 86, 101 (1903). Exclusion, on the other hand, has no constitutional requirement for either a hearing (although some statutes require a hearing) or judicial review. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953). See H. STEINER & D. VAGTS, *supra* note 11, at 29-30.

110. Comment, *supra* note 11, at 146-47. Even where a statute ensures a hearing, judicial review is essential to equal protection because of the relative lack of formal courtroom procedure. Such hearings are conducted entirely by INS officials, on INS premises, and by INS rules. One writer points out the shortcomings:

[T]he subject does not have most of the rights granted an accused criminal, among them the power to subpoena witnesses. Undocumented aliens are not entitled to Miranda warnings, and until recently they did not have a right to counsel at initial hearings or interrogations. Even now it has been mandated that no public monies can be used for their legal defense. There is no burden of proof which must be presented at these hearings, and hearsay evidence is common. Mass hearings and deportations still exist despite court actions stalling what are called MASH (multiple accelerated summary hearings).

Manna, *Human Rights . . . Human Wrongs*, *STUDENT LAWYER*, Mar. 1980, at 32, 37.

Deportation and exclusion hearings are not considered criminal proceedings, and thus the type of hearing described above is considered fair under the requirements of the fifth amendment to the Constitution. See *Zakonaite v. Wolf*, 226 U.S. 272, 275 (1912). It has been held that a hearing under the Immigration and Nationality Act does not deny due process even though the presiding officer is controlled and supervised by INS officials charged with investigative and prosecuting functions. *Marcello v. Bonds*, 349 U.S. 302, 311 (1955). On the general subject, see Mandelker, *Exclusion and Removal Legislation*, 1956 WIS. L. REV. 57; Maslow, *Recasting Our Deportation Law: Proposals for Reform*, 56 COLUM. L. REV. 309 (1956); Note, *The Rights of Aliens in Deportation Proceedings*, 31 IND. L.J. 218 (1956); Note, *Constitutional Restraints on the Expulsion and Exclusion of Aliens*, 37 MINN. L. REV. 440 (1953).

111. The Attorney General may in his discretion parole into the United States

in *Leng May Ma v. Barber*.¹¹² Leng May Ma was a native of the People's Republic of China who sought entry into the United States under a claim of citizenship and was paroled into the country while the INS investigated her claim. When the INS found the claim insubstantial, it ordered her excluded. She petitioned for a writ of habeas corpus, asserting that as an "alien within the United States" under the Act¹¹³ she could invoke the protection accorded aliens who would suffer physical persecution or death if returned to their own country.¹¹⁴ The Court ruled that, even though free on parole, Leng was not legally "within the United States": her legal status was the same as if she had been stopped and held at the border.¹¹⁵ On that basis, the Court held that the protection against repatriation did not apply to her and that she had no constitutional right to invoke habeas corpus.¹¹⁶ Subsequent decisions have followed the same reasoning.¹¹⁷ It is thus possible for the Boat People in the United States to have all the duties of a resident and most of the privileges¹¹⁸ but lack any assertable legal security in that status.

temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return

8 U.S.C. § 1182(d)(5) (1976).

112. 357 U.S. 185 (1958).

113. *Id.* at 186.

114. The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time as he deems to be necessary for such reason.

8 U.S.C. § 1253(h) (1976).

115. 357 U.S. at 189.

116. *Id.* at 190.

117. *Wong Hing Fun v. Esperdy*, 335 F.2d 656, 657 (2d Cir.), *cert. denied*, 379 U.S. 970 (1964) (parolees are "outside the United States and not entitled to assert rights under the Constitution"). Justice Douglas assailed the logic of *Leng May Ma* in a dissent: "How an alien can be paroled 'into the United States' and yet not be 'within the United States' remains a mystery." 357 U.S. at 192.

A 1961 amendment to the Immigration and Naturalization Act provides for habeas corpus review following any final exclusion or deportation order. 8 U.S.C. § 1105a (1976), *as amended* by Pub. L. No. 87-301, § 5a, 75 Stat. 651 (1961). Such reviews, however, have made only slow progress in affecting the conduct of INS hearings. See note 110 *supra* and text accompanying notes 140-45 *infra*.

118. Congress has granted the Indochinese parolees the right to work and the parallel duty to pay taxes, and has made special government benefits available. Comment, *supra* note 11, at 147-48 & nn.86-88.

The second anomaly arising from the separation of doctrines is that an alien illegally within the state¹¹⁹ can assert more rights than an honest applicant for asylum who gains admission through regular administrative action but is denied legal entry. The distinction derives originally from a definition of alien status in part based on the extent to which the alien has established himself¹²⁰ in the country. Somewhat like the serf of old who could free himself by eluding his master for a year and a day, an illegal alien in the United States can establish himself by functioning as part of a community for a while¹²¹ before the INS discovers him. He reaps the reward of his dishonesty by acquiring the same constitutional rights as a resident alien in removal proceedings.¹²² The declared parolee, by contrast, is precluded by his lack of legal presence from ever establishing himself no matter how important he may be to his community.¹²³ But for that arbitrary distinction, most parolees suffer fewer disabilities than illegals¹²⁴ and, thus, could better meet the test of establishment in terms of sanctioned societal expectations, responsibilities, and relationships. The United Nations Charter, through article 7 of the Universal Declaration, which provides that all are equal before the law and are entitled without any discrimination to equal protection of the law, seems to demand a consistent application of the establishment test to *all* aliens, whether legal, illegal, or paroled.¹²⁵

119. An illegal alien may be either one who arrived legally and changed his status, or one who crossed the border surreptitiously or using false credentials. *Id.* at 143 & 145.

120. *Id.* at 145.

121. [I]t is not competent for . . . any executive officer . . . arbitrarily to cause an alien, who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States. No such arbitrary power can exist where the principles involved in due process of law are recognized.

The Japanese Immigrant Case, 189 U.S. 86, 101 (1903).

122. Comment, *supra* note 11, at 143, 145. The illegal entrant is entitled to a deportation hearing, whereas the parolee is statutorily limited to an exclusion hearing. Although the grounds for exclusion and deportation are similar, the grounds are applied more broadly in exclusion proceedings. See Note, *Refugees Under United States Immigration Law*, 24 CLEV. ST. L. REV. 528, 536-37 (1975).

123. The Ninth Circuit has held that a parolee who resided continuously in the country for 20 years was never "physically present." *Yuen Sang Low v. Attorney Gen. of United States*, 479 F.2d 820 (9th Cir.), *cert. denied*, 414 U.S. 1039 (1973).

124. An illegal alien, for example, may not seek employment. Immigration and Naturalization Act § 212(a)(14), 8 U.S.C. § 1182(a)(14) (1976).

125. Immigration policy is so entwined with political measures that the courts

The parole practice of the United States is the extreme example that illustrates the logical absurdity of the continuing lack of correlation between asylum and legal presence. Whatever sound administrative purpose the entry doctrine once had, the United States (and other states to a lesser degree) has divorced it from any reasonable relation to the policing of frontiers. The executive branch and, later, Congress¹²⁶ seized upon the doctrine as a convenient means to serve public sentiment without making binding commitments. If the Boat People should wear out their welcome—or the Cuban expellees, the Hungarian “freedom fighters,” the Russian Old Believers, or any of the other groups the executive has admitted on parole¹²⁷—wholesale exclusion is a quick and quiet way to get rid of them.¹²⁸ Other countries are similarly motivated to avoid giving a foothold to alien national or cultural groups that are or may become unpopular. Their reasons are often valid,¹²⁹ and enjoy a presumption of validity under the state sovereignty doctrine.¹³⁰ Valid reasons nevertheless do not justify methods that bypass due process. It is time for international legal authority to limit the entry doctrine expressly to its original purpose. If the Boat People’s security from persecution is a basic human right, as is evident in the

constantly waver in deciding between an administrative measure and constitutional precepts Changes in policy come so quickly that [immigration advocate] Aberson recently set up a hot line in his office so other immigration lawyers can call in for a recorded message detailing the latest developments.

Manna, *supra* note 110, at 56.

126. Comment, *supra* note 103, at 179-82.

127. *Id.* at 180-81.

128. In response to the continuing criticism of parole as a wholesale practice, Senator Kennedy introduced a bill, H.R. 2816 and S. 643, in the 96th Congress to limit parole to its original role in individual cases of hardship and admit further Indochinese refugees as “lawful permanent residents.” Such admissions would be in a class called “refugees of special concern to the United States,” to be designated by the President in consultation with Congress. 125 CONG. REC. H12,415 (daily ed. Dec. 20, 1979). See *Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, Serial No. 10, 96th Cong., 1st Sess. (1979). Congress passed the Senate version, S. 643, as the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980).

129. Political motivation in controlling immigration is not reprehensible *per se*. The political stability of Malaysia, for instance, as that government perceives it, depends on maintaining a delicate ethnic balance that could be skewed by admitting thousands of refugees of one ethnic group. See *Indochinese Refugees*, *supra* note 19, at 33; *Malaysia Reports 13,000 Refugees Expelled*, N.Y. Times, June 26, 1979, § A, at 1, col. 2; *Thais on Refugees: West Must Take Them*, *id.*, June 20, 1979, § A, at 3, col. 1.

130. Courts are disinclined to examine the legitimacy of a foreign state’s public action. N. LEECH, C. OLIVER, & J. SWEENEY, *CASES AND MATERIALS ON THE INTERNATIONAL LEGAL SYSTEM* 392-93 (1973) (“act of state” doctrine).

Universal Declaration,¹³¹ it is too important to depend on the favor of a legislature or the unreviewable ruling of a bureaucrat.

THE RIGHT TO CONTINUED PRESENCE: *Non-Refoulement*

Boat People who succeed in establishing their legal presence at international law thereupon come within the scope of *non-refoulement*, a principle that addresses the first need of any refugee: freedom from forcible return. The moral authority of this principle in international law is well established. Its history goes back to 1933, when the Convention Relating to the International Status of Refugees¹³² incorporated a provision that the contracting parties agreed not to reconduct (*refouler*) refugees across the borders of their country of origin.¹³³ The rule gained broad currency with its adoption in the Refugee Convention of 1951.¹³⁴ That convention had been in effect only a few months when the United Nations Conference on the Status of Stateless Persons¹³⁵ unanimously declared *non-refoulement* a "generally accepted principle."¹³⁶ The General Assembly subsequently endorsed the principle by adopting it as part of the Declaration on Territorial Asylum.¹³⁷

131. See, e.g., Universal Declaration, arts. 6-12, 18-20, *supra* note 10, at 108-10.

132. Done Oct. 28, 1933, 159 L.N.T.S. 199.

133. *Id.* ch. 2, art. 3, § 2. The English translation read that each of the contracting parties "undertakes in any case not to refuse entry to refugees at the frontiers of their countries of origin." *Id.* The French term now is substituted for the English because that passage contained an error. "Refuse entry" was a mistranslation of "*refouler*," which actually means "send back." Thus the provision refers only to refugees already in the territory. See II A. GRAHL-MADSEN, *supra* note 3, § 179(i).

The Convention Concerning the Status of Refugees Coming from Germany, done Feb. 10, 1938, 192 L.N.T.S. 59, restated the rule. Both documents, however, were signed by only a small number of nations, and thus the rule did not have the status of a general principle before World War II. See II A. GRAHL-MADSEN, *supra* note 3, § 178(ii).

134. Done July 28, 1951, 189 U.N.T.S. 137, *supra* note 16.

135. This conference assembled to draft the Convention Relating to the Status of Stateless Persons, done Sept. 28, 1954, 360 U.N.T.S. 117, *supra* note 33. II A. GRAHL-MADSEN, *supra* note 3, § 178(ii).

136. II A. GRAHL-MADSEN, *supra* note 3, § 178(ii). The statement does not carry the same weight as a pronouncement in an ICJ decision, nor does any such statement establish a principle as customary law in the absence of actual worldwide practice, whether recognized or tacit.

137. *Supra* note 18. Some writers refuse to call *non-refoulement* a legal principle, although consensus exists that it has standing as at least a moral principle. Starke calls it a standard or desideratum of international law but not a guarantee. J. STARKE, *supra* note 20, at 388. Grahl-Madsen would afford it only the status of a moral means of convincing a government, not a basis for legal argument. II A. GRAHL-MADSEN, *supra* note 3, § 178(ii); A. GRAHL-MADSEN, TERRITORIAL ASYLUM § 4.2.2 (1980). Nayar refers to *non-*

Adding to the legal force of *non-refoulement* is its parallel development in the United States, which began in 1950 although the United States did not endorse the Refugee Convention until 1968.¹³⁸ Similar to its use of the entry doctrine, the United States has applied the principle selectively; but that approach is slowly changing. The selectivity derives from the phrasing of the amended Internal Security Act, which since 1950 has enjoined the Attorney General from deporting an alien to a country where he would be persecuted.¹³⁹ The Act's definition of persecution, however, is limited to "persecution on account of race, religion, or political opinion";¹⁴⁰ and furthermore the Attorney General (through the INS) has the discretion to decide on the existence of such persecution.¹⁴¹ Under the later provision, the INS acted as both judge and jury on the factual question of persecution until a 1977 court decision held that due process to a refugee barred the INS from selectively excluding certain kinds of evidence.

The case was *Coriolan v. INS*,¹⁴² in which the court allowed a Haitian refugee to present evidence of general political conditions in his country as justification for claiming asylum.¹⁴³ Haitian refugees, like the Boat People, flee their country by sea and arrive at other shores (in their case, Florida) in oftentimes desperate condition. Like the Boat People, they say they are fleeing political persecution. Unlike the Boat People, however, they are

refoulement as a "negative principle that has now emerged" without specifying its nature. He implies, however, that it is a legal principle by way of its clear prohibition, contrasting it to a duty to admit, which states are reluctant to recognize because of the positive burden it would impose. Nayar, *supra* note 97, at 43.

138. The United States has been a party to very few United Nations conventions because of a pervasive fear that the self-execution of treaties in municipal law would subvert the Constitution or subject the nation to rule by international tribunal. The high point of that fear was the nearly successful effort in the Senate, from 1952 to 1955, to pass the Bricker Amendment, which in its various forms would limit the treaty-making power, eliminate self-execution of treaties, or give Congress the power to regulate all executive agreements. See H. STEINER & D. VAGTS, *supra* note 11, at 486-90; Finch, *The Need to Restrain the Treaty-Making Power of the United States Within Constitutional Limits*, 48 AM. J. INT'L L. 57 (1954); Whitton & Fowler, *Bricker Amendment—Fallacies and Dangers*, 48 AM. J. INT'L L. 23 (1954); Comment, *Individual Enforcement of Obligations Arising Under the United Nations Charter*, 19 SANTA CLARA L. REV. 195 (1979).

139. 8 U.S.C. § 1253(h) (1970).

140. *Id.* On the INS interpretation of this phrase, see Note, *supra* note 122, at 683-87.

141. 8 U.S.C. § 1253(h) (1970).

142. 559 F.2d 993 (5th Cir. 1977).

143. *Id.* at 1004.

fleeing an anticommunist government that is friendly to the United States, and this fact has made a significant difference in their treatment under the Internal Security Act.¹⁴⁴ One inequity, prior to *Coriolan*, was the INS requirement that they present evidence of their personal liability to persecution, whereas refugees from communist countries—like the Boat People—needed to show only the general political conditions they were escaping.¹⁴⁵ The Fifth Circuit in *Coriolan*, invoking the authority of the Refugee Protocol,¹⁴⁶ held that the same evidentiary standard should apply to all irrespective of national policy or administrative discretion¹⁴⁷ and, therefore, that an Amnesty International report on conditions in Haiti was admissible evidence in *Coriolan*'s hearing.¹⁴⁸ *Coriolan* is only one step in removing the inequities of *non-refoulement* as practiced by the United States;¹⁴⁹

144. The criteria for entry, "persecution on account of race, religion or political opinion," can be used restrictively to bar entry of those whose persecution does not fit under those labels. See 8 U.S.C. § 1253(h) (1970). The "boat people" from Haiti contend that they are the victims of such a slanted application:

The dispute concerns whether the Haitians are fleeing political persecution or are victims of intense poverty. The U.S. is bound by international protocol to let political refugees stay. But the Haitians, according to their supporters, are the victims of the U.S. government's double standard Under a set of regulations left over from the Cold War, nearly anyone who comes from a Communist country or from the Middle East is a "political refugee"

But those claiming asylum from right-wing governments, no matter how blatantly oppressive, have had a far more difficult time gaining entry, since they must prove with documents and witnesses that they *personally* will be subject to persecution if they return.

Krajick, *Refugees Adrift*, SATURDAY REVIEW, Oct. 27, 1979, at 17.

145. See Note, *Coriolan v. Immigration and Naturalization Service: A Closer Look at Immigration Law and the Political Refugee*, 6 SYRACUSE J. INT'L L. & COM. 133 (1978).

146. Administration testimony before Congress at the time of the hearings about signing the Protocol gave the impression that the Protocol would have no internal effect on United States immigration laws, which were considered a model for the world. Otherwise Congress probably would not have approved the signing. See note 138 *supra*. See also Comment, *Immigration Law and the Refugee—A Recommendation to Harmonize the Statutes with the Treaties*, 6 CALIF. W. INT'L L.J. 129, 133, 136 (1975).

147. 559 F.2d at 1004.

148. *Id.*

149. Note, *supra* note 145. For other progress in the same field, see *Sannon v. United States*, 427 F. Supp. 1270 (S.D. Fla.), *vacated and remanded for decision on possible mootness*, 566 F.2d 104 (5th Cir. 1977), *on remand* 460 F. Supp. 458 (S.D. Fla. 1978) (held not moot). The issue was whether 300 paroled Haitian refugees could claim political asylum at an exclusion hearing; Judge Lawrence King held that a full, fair adversary hearing under the Refugee Protocol required the INS immigration judge to let the aliens present their claim, thus putting them on the same procedural footing as deportable aliens under the Protocol. 427 F. Supp. at 1277. On remand from the Fifth Circuit to determine mootness under new INS hearing regulations, Judge King held the

but the decision is important in that it places the principle solidly in the field of law, not policy, and uses the International Bill of Rights as a specific ground of decision.¹⁵⁰ Coming from the United States, *Coriolan* is persuasive authority that *non-refoulement* is a legal and not only a moral principle¹⁵¹ and is therefore available for the Boat People's use in an international forum.

THE PROBLEM OF STANDING

Of course, to plead any principle in an international forum, the Boat People must first gain access to the forum. Formidable obstacles stand in their way. Because they have no international juridical standing as individuals,¹⁵² some international person (state) must step in to represent them. Because international rules of standing have developed along the same lines as municipal rules of standing, the litigant must have a real interest in the

case not moot because the regulations were improperly promulgated, and continued a stay order on exclusion proceedings until issuance and review of properly promulgated regulations. 460 F. Supp. at 468. In dictum, Judge King called the new regulations insufficient as well because they retained the summary judgment procedure for excludable aliens. Neither the former nor the new regulations, he noted, had a counterpart to that procedure for aliens classified as deportable. *Id.* at 466 & n.31.

150. Another recent advance in the use of the Bill in the United States is *Filartiga v. Pena-Irala*, 49 U.S.L.W. 2039 (2d Cir. June 30, 1980), *supra* note 68, where the court found a right of action for the tort of official torture even though both plaintiff and defendant were nationals of Paraguay and the alleged tort had occurred in Paraguay. The plaintiff, Dr. Joel Filartiga, alleged that the defendant, a former inspector general of the Paraguayan police, had tortured and killed his son, Joelito Filartiga, in 1976 in retaliation for the plaintiff's political activities. The applicable international law condemning torture was the Universal Declaration, art. 5, *supra* note 10, at 108; the International Covenant on Civil and Political Rights, art. 7, *supra* note 61, at 214; the American Declaration of the Rights and Duties of Man, art. XXVI, Res. XXX, 9th Int'l Conf. of American States (1948), reprinted in BASIC DOCUMENTS ON HUMAN RIGHTS, *supra* note 10, at 393-94; and the American Convention on Human Rights, art. 5, § 2, signed Nov. 22, 1969, O.A.S. T.S. No. 36, at 1, *id.* at 402. Tuttle & Schneebaum, *Tort Action in US Court for Torture in Paraguay: Amicus Brief*, 37 GUILD PRAC. 67 (1980). Not one of the cited documents has effect as a treaty within the United States; the court recognized the force of the "clear and unambiguous" torture prohibition entirely as customary international law. Furthermore, the decision recognizes an individual right of action when fundamental human rights are violated, even where all parties are nationals of the same state, and universal jurisdiction to prosecute such actions, as exists for piracy and war crimes. See J. STARKE, *supra* note 20, at 307-12 (universal jurisdiction).

151. The United States is committed to *non-refoulement* as a signer of the Protocol. Thus *Coriolan* cannot be persuasive in nonsignatory states unless *non-refoulement* transcends the Protocol; the relatively long history of the principle, however, and its endorsement by the United Nations indicate that it does. See text accompanying notes 132-37 *supra*.

152. See note 23 *supra*.

case.¹⁵³ This means ordinarily that the state of the individual's citizenship must represent him—a rule of small help to political refugees, who by definition are rejected by their own state. A more promising possibility for the Boat People is the modern extension of international juridical standing to international organizations as well as states. In the *Advisory Opinion on Reparation for Injuries Suffered in the Service of the United Nations*,¹⁵⁴ the ICJ determined that the United Nations itself is an international person with the right to bring a claim against a government in the capacity of itself or its agents.¹⁵⁵ Later decisions have recognized the right of specialized agencies of the United Nations to seek ICJ advisory opinions on questions "arising within the scope of their activities."¹⁵⁶ These decisions have settled the issue that the United Nations and its constituent organizations may adjudicate the claims of their agents or other individuals¹⁵⁷ if necessary to carry out their functions. Fol-

153. It is an elementary principle of international law that a State is entitled to protect its subjects By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights—its right to ensure, in the person of its subjects, respect for the rules of international law.

Mavrommatis Palestine Concessions (Jurisdiction), [1924] P.C.I.J., ser. A, No. 2. The *Mavrommatis* decision was quoted in the *Nottebohm Case*, [1955] I.C.J. 4, where the lack of any real interest on the part of Liechtenstein, despite its grant of naturalization to German citizen Friedrich Nottebohm, prevented it from pressing Nottebohm's claim for admission to Guatemala:

That naturalization was not based on any real prior connection with Liechtenstein, nor did it in any way alter the manner of life of the person upon whom it was conferred in exceptional circumstances of speed and accommodation

Guatemala is under no obligation to recognize a nationality granted in such circumstances. Liechtenstein consequently is not entitled to extend its protection to Nottebohm vis-a-vis Guatemala

Id. at 26.

154. [1949] I.C.J. 174.

155. See note 23 *supra*.

156. U.N. CHARTER art. 96, § 2. See, e.g., Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, [1973] I.C.J. 166 [hereinafter referred to as Application for Review]. In that decision the court held that a broad interpretation of "scope of activities" was necessary to enable the United Nations to accomplish its purposes and function effectively. *Id.* at 172.

157. The real party in interest in the Application for Review case was Mohamed Fasla, a former official of the United Nations Development Programme, contesting in an individual capacity the procedure whereby the UNDP terminated his employment. [1973] I.C.J. at 168-70. On the question of proceedings involving individuals, the court stated that "[t]he mere fact that it is not the rights of States which are in issue in the proceedings cannot suffice to deprive the Court of a competence expressly conferred on it by its Statute." *Id.* at 172.

lowing that logic, the Office of the UNHCR should be able to claim *non-refoulement* for the Boat People—at least those in the camps for which it is responsible¹⁵⁸—when forcible return interferes with the agency's mission.¹⁵⁹

Administrative and executive actions are other avenues of redress that do not depend on technical rules of international personhood. Thus, certain specialized agencies of the United Nations have internal provisions for petitions by individuals.¹⁶⁰ The General Assembly, the executive body of the United Nations, may make resolutions about areas of concern.¹⁶¹ Enforcement of any such resolutions can occur only through consensual behavior of the community of nations; but this is true as well of international administrative and judicial deci-

158. The UNHCR staffs or helps financially to support a number of the Boat People camps in Southeast Asia. Report of the UNHCR, *supra* note 88, at 41-43. Most of the camps have a chronic lack of space, sanitary facilities, food, and medical aid. N.Y. Times, *supra* note 24, at 14, col. 2.

159. Decisions to date have based reparations to United Nations agencies on the extent to which the organization was hindered in its capacity to discharge its functions. The *Reparations* opinion, however, referred in dictum to "damage to the interests of which [an international agency] is the guardian" as a basis for reparations. [1949] I.C.J. at 180. By the Statute of the Office of the UNHCR, that official is charged with "international protection" of the interests of refugees. See note 41 *supra*, ch. II, arts. 6 & 7. The UNHCR's work is on a voluntary basis, see text accompanying notes 40-41 *supra*, yet because the statute establishes the office as guardian of the refugees' interests, the office theoretically could represent them in requesting an advisory opinion from the ICJ. Statute of the ICJ, *supra* note 23, art. 65 ("The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request."). See generally Weis, *supra* note 8, at 207-21; I. A. GRAHL-MADSEN, *supra* note 3, § 30; J. STARKE, *supra* note 20, at 75, 79.

160. Under the Constitution of the International Labour Organization, industrial associations of employers or workers may make representations to the Governing Body of the International Labour Office, and any member state of the organization has the right to file a complaint if dissatisfied with the performance of another state. I. A. GRAHL-MADSEN, *supra* note 3, § 31(iv). In addition, the European Human Rights Convention allows "any person, non-governmental organization or group of individuals claiming to be the victim of a violation" to petition the European Commission of Human Rights, which may then bring the case before the European Court of Human Rights. European Convention on Human Rights, arts. 25(1) & 48, signed Nov. 4, 1950, [1951] Gr. Brit. T.S. Misc. No. 1 (Cmd. 8130), 213 U.N.T.S. 221, reprinted in BASIC DOCUMENTS ON HUMAN RIGHTS, *supra* note 10, at 346-47, 351. Similarly, the International Covenant on Civil and Political Rights sets up a Human Rights Committee to investigate human rights violations and refer them to a Conciliation Commission, *id.* arts. 28, 41, 42(1)(a), *supra* note 10, at 221, 225-27, and the Optional Protocol authorizes the Human Rights Committee to receive petitions from aggrieved individuals, *id.* art. 1, *supra* note 10. Such procedures are prototypes for possible expanded representation of individuals through routes other than their direct sovereign states.

161. But see note 78 *supra*.

sions.¹⁶² Because consensus is the basis of all international law, the greatest force for world justice is, as one commentator put it, the "mobilization of shame."¹⁶³

A point in favor of a limited right of asylum along the lines drawn herein is the fact that it is not a great departure from current world understandings. It does not affect a state's right to refuse admission at the border or, alternatively, to expel a refugee to a third country. It has no impact on a state's municipal laws. It calls only for a narrow implementation of a generally recognized principle, *non-refoulement*, that is already a voluntary practice in most of the world. It is not without difficulties, notably the problem of enforcement; that is, without the application of world political pressure there can be no enforcement. Evidence that such pressure is available, even if misdirected, is the political inducement applied to Vietnam to cut off the refugee exodus last year.¹⁶⁴ The use of such pressure to spread the burden of misery, rather than to concentrate the burden at its source, would in the long run do more to ease it.¹⁶⁵

CONCLUSION

The Boat People's security from return can come about only through right, not through bestowal. A number of states have made a gesture of accepting Boat People without a grant of entry; but such gestures, however well meant and however accompanied by privileges, are not based on legal principles and thus do little to advance the recognition of a right to asylum. Charitable gestures in fact make recognition more remote by easing the pressure to find a legal solution. The modest step of rationalizing the entry doctrine, as proposed in this comment, could bring about a limited exception to the prevailing treat-

162. See note 56 *supra*.

163. Newman, *supra* note 84.

164. Hanoi Said to Agree to Attempt to Halt Exodus of Refugees, *supra* note 91. United Nations Secretary General Kurt Waldheim, who negotiated the measure, did not reveal the nature of the inducement. Officials of the Office of the UNHCR were unhappy about the arrangement, but Waldheim justified it as the only reasonable choice, saying: "We are in a dilemma." *Id.* at 1, col. 6.

165. To spread the burden, third-party states must be willing to give secondary temporary asylum to refugees not wanted by the states of primary asylum; otherwise the primary asylum states will send the refugees back to where they came from. In the long run, self-interest favors the establishment of such a practice lest those states refusing aid today find themselves tomorrow with a similar mass of refugees and no way to disperse them.

ment of refugees.¹⁶⁶ Given the moral force behind international human rights law, other exceptions will follow, and ultimately those exceptions will swallow the old rules. Better sooner than later. Even if all the Boat People find new homes,¹⁶⁷ history shows that other cycles of refugees will arise to maintain the numbers of the world's dispossessed. The longer the delay in realizing Weis's rule, the more pain and frustration await those refugees of the future.*

Brian Roberts

166. Standardizing the meaning of "entry" might appear to take away states' freedom to define it for themselves and thus conflict with the United Nations Charter provision that "[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State" U.N. CHARTER, art. 2, § 7. It would leave states free, however, to define entry internally in any way they wish; the change would be in the external effect of such definition. An analogous situation was the *Nottebohm Case*, [1955] I.C.J. 4, where the ICJ denied the international effect of Liechtenstein's grant of citizenship to Guatemalan resident Nottebohm. See note 153 *supra*. The decision had no effect, however, on Nottebohm's status within Liechtenstein; he could still live there as a citizen if that state allowed him to. [1955] I.C.J. at 20. Similarly, a standardization of legal entry would not constrain states within their borders but would operate precisely when most needed: as soon as a state attempted to give external effect to its determination by expelling asylees across an international boundary. If such expulsion were pursuant to a definition of legal entry that violated the international standard, the community of nations would have no obligation to recognize or enforce it. Thus the office of the UNHCR, if granted standing, see note 159 *supra*, might resist removals from camps under its control; or, if expulsions were by sea, ships of other states might redeposit the refugees on the same shores notwithstanding the state sovereignty doctrine. See note 5 *supra*. See also *International Protection of Human Rights: Hearings Before the Subcomm. on Int'l Orgs. & Movements of the House Comm. on Foreign Affairs*, 93d Cong., 1st Sess. 502-03, 555 (1973) (human rights and peacekeeping provisions of charter balance nonintervention clause).

167. The possibility is remote in view of the general reluctance exhibited by other nations, the sheer numbers of Boat People, and the history of similar mass dispossessions. Cf. Radley, *supra* note 32 (history of the Palestinian refugees).

* Editor's note: In 1980, with the slackening of immigration and increased commitments from some states of permanent asylum, notably the People's Republic of China, Australia, and France, the population of Boat People in the Southeast Asian camps fell considerably. *Indo-Chinese refugees: 400,000 persons resettled since 1975*, UNHCR, April-May 1980, at 11 (UNHCR is the title of the official periodical of the Office of the UNHCR); *Protection of Refugees and Displaced Persons in South-East Asia*, UNHCR, Sept.-Oct. 1980, at 6; *Safe Ashore at Last*, TIME, Jan. 19, 1981, at 45. Such resettlement, however, does not proceed from any new developments in international law. The Manila Declaration on the International Protection of Refugees and Displaced Persons in Asia, adopted by a Round Table of Asian refugee experts convened by the UNHCR in April 1980, UNHCR, Sept.-Oct. 1980, at 6, is a step forward in regional consideration of the asylum problem but is still far from having legal effect. Meanwhile, political developments elsewhere in the world have resulted in refugee populations of unmanageable proportions. Sudan, one of the world's poorest nations, is trying to cope with 400,000 refugees from Ethiopia, Uganda, Zaire, and Chad. *Sudan A land of asylum for 400,000 refugees*, UNHCR, April-May 1980, at 7. Somalia, with more than 600,000 Ethiopians,

and Pakistan, with a similar number of Afghans, probably have the most serious international refugee problems at this time. *Somalia: one out of every five inhabitants is a refugee, id.*, at 8.